

Hew Hai Woon v Citibank Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
B-02(IM)-455 OF 2009

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LOW HOP BING, ABDUL WAHAB PATAIL AND ANANTHAM
KASINATHER JJCA
29 FEBRUARY 2012

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Land Law — Charge — Order for sale — Whether land administrator's order for sale rightly made — Whether chargor proved she was not informed of land enquiry — Whether High Court right in refusing to go into merits of order made by land administrator

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The appellant executed a charge over his land in favour of the respondent to secure the latter's loan to a third party. The borrower defaulted and the respondent applied for an order for sale of the land from the land administrator ('the first order'). When three auctions of the property proved futile, the respondent obtained, in substitution of the first order, the High Court's order for the sale of the land pursuant to s 265(3) of the National Land Code. In the High Court the appellant argued that the first order was fundamentally flawed as she was not informed of the land enquiry and therefore was denied of her right to contest the making of the order. She also said limitation had set in to preclude the respondent from foreclosing on the land. The High Court found the appellant's allegations to be an afterthought as she not only never complained to the land administrator over the alleged failure to inform her of the land enquiry but she also did not explain why she took 16 months after the close of the enquiry to ask the land administrator to reopen the enquiry. The appellant canvassed the same arguments in her appeal to the Court of Appeal against the High Court's order for sale.

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Held, dismissing the appeal with costs:

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- (1) As the submissions did not address the question whether it was true no notice of the land enquiry had been served on the appellant in accordance with law, it followed that the submission the land enquiry was a nullity because of the lack of notice, failed, and the order of the land administrator in the land enquiry remained valid (see para 7).
- (2) The High Court had acknowledged the grounds raised by the appellant including the question of limitation and correctly relied upon the Court of Appeal's decision in *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618. The High Court did not err in refusing to go into the merits of the order made by the land administrator (see paras 11–12).

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A [Bahasa Malaysia summary]

- Perayu melaksanakan caj ke atas tanahnya memihak responden untuk menjamin pinjaman responden kepada pihak ketiga. Peminjam mengingkari dan responden memohon perintah jualan tanah tersebut daripada pentadbir tanah ('perintah pertama'). Apabila tiga lelongan hartanah tersebut membuktikan sia-sia, responden mendapatkan, dalam gantian perintah pertama, perintah Mahkamah Tinggi untuk jualan tanah tersebut berikutan s 265(3) Kanun Tanah Negara. Di Mahkamah Tinggi perayu berhujah bahawa perintah pertama adalah pada dasarnya cacat memandangkan dia tidak diberitahu mengenai siasatan tanah tersebut dan oleh itu dinafikan haknya untuk mempertikaikan pembuatan perintah tersebut. Dia juga berkata had masa telah ditetapkan untuk menghalang responden daripada merampas tanah tersebut. Mahkamah Tinggi mendapati dakwaan perayu sebagai fikir semula memandangkan dia bukan saja tidak pernah membuat aduan kepada pentadbir tanah terhadap kegagalan yang didakwa untuk memberitahu dia mengenai siasatan tanah tersebut tetapi juga tidak pernah menjelaskan mengapa dia mengambil 16 bulan selepas siasatan ditutup untuk meminta pentadbir tanah membuka semula siasatan tersebut. Perayu merayu hujahan yang sama di dalam rayuannya kepada Mahkamah Rayuan terhadap perintah jualan Mahkamah Tinggi tersebut.
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Diputuskan, menolak rayuan dengan kos:

- F** (1) Memandangkan penghujahan tidak merujuk soalan sama ada adalah benar tiada notis mengenai siasatan tanah telah diserahkan ke atas perayu mengikut undang-undang, dengan itu penghujahan bahawa siasatan tanah adalah terbatal kerana tidak terdapat notis, gagal, dan perintah pentadbir tanah dalam siasatan tanah tersebut kekal sah (lihat perenggan 7).
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- (2) Mahkamah Tinggi telah menerima alasan-alasan yang dibangkitkan oleh perayu termasuk soalan had masa dan bergantung dengan betul atas keputusan Mahkamah Rayuan di dalam kes *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618. Mahkamah Tinggi tidak tersilap dalam menolak untuk mendengar merit perintah yang dibuat oleh pentadbir tanah (lihat perenggan 11–12).]
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Notes

- I** For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2614–2775.

Cases referred to

Lee Gee Pheng v RHB Bank Bhd [2004] 1 MLJ 618, CA (folld)

Legislation referred to

Limitation Act 1953 ss 21(1), (2), 32

National Land Code ss 34(1), 256, 261(1)(c), 265(3), (3)(a), (b), Form 16G

Rules of the High Court 1980 O 31, O 83

WP Leong (WP Leong & Partners) for the appellant.

Robin Lim (Fariza Sanusi with him) (Azhar & Wong) for the respondent.

Abdul Wahab Patail JCA:

[1] The appellant Hew Hai Woon appealed against the decision of the judge of the High Court at Shah Alam, allowing the respondent's originating summons under O 31 and O 83 of the Rules of the High Court 1980 for an order for sale.

[2] The appellant had allowed his property known as Hakmilik Strata PM57/M3/3/154, No Petak 154 dalam Tingkat 3, Bangunan No M3 dan petak-petak aksesori A135 dan A180, Lot No 37561, Bandar Sunway, Daerah Petaling, Selangor ('the said property') to be used as a third party security for a facility granted to one Leong Wey Pyu ('the borrower') under a facility agreement dated 30 June 1994. It is not disputed that under the third party charge, the defendant had agreed to pay to the plaintiff on demand, the whole of the sums that had been advanced by the plaintiff to the borrower under the facility agreement. The borrower defaulted. The respondent issued a letter of demand on 29 November 2006, and an order for sale from the Pejabat Tanah Daerah Petaling. Despite auctions on 28 June 2007, 21 August 2007 and 9 October 2007, there were no takers. The respondent made the application to the High Court, whose decision is now the subject in this appeal. The application was essentially for a substitution of the land office's order for sale pursuant to ss 265(3)(a), (b) and 256 of the National Land Code.

[3] The first ground of appeal pertains to the alleged failure by the land administrator to serve notice of the land enquiry. It was submitted:

Since the Appellant has no knowledge of the date of the hearing of the 'Enquiry' at the Land Office due to the failure of the Land Office to serve the 'Saman untuk Penyiasatan' to the Appellant, the Appellant could not be present at the hearing of the 'Enquiry'.

In fact, the Land Administrator is under a mandatory statutory duty to inform the Appellant to attend for the investigation. By failing to do so, the Land Administrator has breached its mandatory statutory duty under section 261(1)(c) National Land Code. Thus, the Appellant cannot be faulted for not appearing at the 'Enquiry' due to no fault of the Appellant.

A The Appellant was deprived of her right to be present at the 'enquiry' and was also deprived of an opportunity to present her objections. Thus, the rules of natural justice have been breached in that the appellant was deprived of her right to be heard and thus, injustice has been caused to the Appellant.

B [4] The submission proceeded on the assumption that the appellant had no knowledge. The issue is whether the evidence showed the appellant indeed had no knowledge.

C [5] In this regard, the findings of the learned judicial commissioner is very specific:

D 9 On this issue, I must admit that I find it rather strange that the defendant should now raise this as an objection because as was submitted by learned counsel for the defendant the first time the defendant came to know of the order for sale was when the plaintiff's solicitors wrote a letter enclosing a copy of the proclamation of sale informing the defendant that the said property was to be auctioned on 28 June 2007. This letter is dated 6 April 2007. This means that this letter was written on the same day the order for sale was obtained from the land administrator. The defendant has, however, only written to the land administrator to apply for the enquiry to be reopened only on 14 October 2008 which is about 16 months after the said enquiry. There was no explanation as to why the defendant took so long to write to the land administrator. There is also no evidence adduced by the defendant to show that she had made efforts to complain or make known to the land administrator of the fact that she had not been informed of the enquiry. In the absence of the explanation and the evidence, I am in agreement with the learned counsel for the plaintiff that this allegation is more of an afterthought. It is a denial without any basis. On that score, this issue raised by the defendant must fail.

G [6] That the letter was not dated 6 April 2007 but was 4 June 2007 simply means that the appellant wrote two months later than the learned judicial commissioner thought. The application was made under s 34(1) of the National Land Code. However, the word 'may reopen' in the said section means it is discretionary and not mandatory for the land administrator to reopen the enquiry. The fact remains the enquiry was not reopened and the learned judicial commissioner has to address the application made before her.

I [7] For the reason that the submissions before us, and likewise before the learned judicial commissioner did not address the question of fact itself whether it is true that no notice had been served on her in accordance with law, it must follow that the submission that the land enquiry was a nullity because no notice has been served is without any leg to stand on, and must fall, and the order of the land administrator in the land enquiry remains valid.

[8] We, therefore, dismiss this ground of appeal.

[9] Given that the order by the land administrator is not declared to be a nullity, the submissions with regard to 'cause to the contrary', including 'cause to contrary' founded upon a nullity, and the associated submissions with regard to assertions in affidavits not being replied to or contested, are irrelevant before this court.

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[10] It was submitted that the learned judicial commissioner has failed to adequately consider the question of s 32 of the Limitation Act 1953 and acquiescence, laches or otherwise in its totality. It was submitted that when the respondent filed Form 16G on 7 March 2007, it was 12 years and 6 days after the right to receive the money (s 21(1) of the Limitation Act 1953) or the right to foreclose (s 21(2) of the Limitation Act 1953) accrued on 28 February 1995 when the respondent demanded the sum of RM305,091.85.

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[11] The learned judicial commissioner acknowledged other grounds raised including the question of s 32 of the Limitation Act correctly relied upon *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618. It is a decision of this court and binding upon the High Court. It was held:

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By its terms, it is clear that s 265(3) cannot be construed as requiring the High Court to treat the originating summons as a fresh application for an order for sale of land held under registry title requiring compliance by the respondent with the provisions applicable thereto. Section 265(3) merely confers on the High Court the power to substitute the first order for sale under s 256.

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... The procedure for sale prescribed under s 265(3) is merely a continuation of the proceeding of transforming the order for sale by the land administrator into that of the High Court.

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Since all the requirements to obtain the first order for sale of the land held under land office title had been duly complied with and no challenge had ever been made against it, the appellant could not at the originating summons stage Question the merits of the order for sale granted by the land administrator. The appellant could have appealed to the High Court under s 418 of the Code which she initially did only to withdraw it later. Follows therefore that the validity of the first order for sale cannot now be challenged.

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[12] In the circumstances, the learned judicial commissioner did not err in refusing to go into the merits of the order by the land administrator. An appellate court may only intervene to correct an error by the High Court. Unless it is shown that the High Court, the court of original jurisdiction and upon whom the primary responsibility of justice rests, had erred, any intervention is an unwarranted interference.

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A [13] For the foregoing reasons, we dismissed the appeal with costs.

Appeal dismissed with costs.

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Reported by Ashok Kumar

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